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Ong See Teong & Anor v Tenaga Nasional Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1069 OF 2007
SURIYADI, ZAINUN ALI AND AHMAD MAAROP JJCA
10 FEBRUARY 2009

Public Authorities — Statutory body — Powers of — Tenaga Nasional Bhd — Upgrading exercise to enhance electricity supply system — Entry to piece of appellants' land — Whether land should have been acquired by government — Whether respondent's exercise consisted life threatening factors — Whether there were alternative ways to solve issues

The appellants and other residents of Kampung Sungai Terentang were occupying a piece of land as licensees. Subsequently, most of the residents were issued with titles to their land. The respondent undertook upgrading exercise as part of long-term plan to enhance the electricity supply system under a project known as Central Area Reinforcement. The appellants objected to the alleged upgrading work and argued that a notice under s 13 of the Electricity Supply Act 1990 ('the Act') was inapplicable for the anticipated work. The respondent had intended to construct within the appellants' land a main supply line, 5-foot pathway reserved for inspection of the supply line, the use of existing roads and lane to carry out upgrading work and to carry out maintenance and related works when necessary. The appellants applied for a judicial review in respect to the respondent's decision, which came in the form of notice issued by the respondent under s 13 of the Act. The appellants alleged that the notice did not merely permit the respondent to carry out and complete the proposed upgrading work as the respondent ought to take into consideration the rule of proportionality and effect of the upgrading work towards the appellants. The appellants also argued that the respondent had also failed to take into consideration an alternative route. The learned High Court judge in dismissing the appellants' application concluded, inter alia, (i) that entry to the piece of the appellants' land for carrying out the installation works depended on the existence of posts that had been lawfully erected earlier; (ii) that public interest to prevent nationwide electricity disruption outweighed the private interest of the appellants; and (iii) that new grounds were raised which were not pleaded by the appellants in their statement. Further, the learned High Court judge opined that the intended work by the respondent were for the purpose of maintaining, repairing or upgrading any installation on the piece of land, hence the notice fell correctly within the procedure and purpose of s 13 of the

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Act. Prior to the appeal the respondent had consented that the appellants could use fresh evidence for the appeal and file a supplementary record of appeal.

Held, allowing the appeal with costs here and court below:

(1) The government had in the interest of the appellants and 23 other residents of Kampung Sungai Terentang (the affected residents) suggested either to undertake acquisition of the said piece of land or to consider alternative routes. However, the respondent irrationally and unreasonably persisted to enforce the notice issued under s 13 of the Act. The factual evidence conspicuously revealed the irrationality of not acquiring the lands involved (see para 12).

(2) Evidence adduced also confirmed the negative medical effect on people, especially children who are more susceptible to leukaemia and like diseases, when bombarded by the flow of electricity passing over the affected residents' houses. Despite these hazardous life-threatening factors, the respondent argued that adequate monetary compensation would be given to the affected residents for their discomfort. The subtle and unconscionable way of driving and depriving, the affected residents of their properties were in effect an acquisition of their land by the respondent (a power exercisable only by the state authority) which would contravene their constitutional rights (art 13 of the Federal Constitution) (see para 12).

(3) With a mega project in the offing, the affected residents would witness a major emplacement of the transmission lines together with the structures holding them and affecting the area involved directly. The respondent's upgrading works could not be construed as an exercise to repair and maintain the existing part in the ordinary sense when the new superstructures would radically and fundamentally alter the landscape and become permanent features (see para 13).

(4) The respondent's argument that public interest must override the grievances of the appellants and the affected residents would be trampling over a minority's rights, though in certain circumstances may be acceptable, sounds hollow when there were other alternative ways to solve the problem (see para 14).

(5) Although the appellants' pleadings did not state anything about the notice pursuant to s 13 of the Act suffering errors of law, it is trite that courts are more concerned with the justice of a matter rather than being overly concerned with format or procedure. The respondent was not at any juncture caught flatfooted or prevented from replying the issues

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that were not pleaded, thus, the respondent's submission of being caught unaware and unprepared was without merit (see para 15).

[Bahasa Malaysia summary

Perayu-perayu dan penduduk Kampung Sungai Terentang menduduki sebidang tanah sebagai pemegang lesen. Selepas itu, kebanyakan penduduk tersebut diberikan hak milik kepada tanah tersebut. Responden menjalankan penambahbaikan sebagai sebahagian daripada rancangan jangka panjang untuk meningkatkan sistem bekalan elektrik di bawah satu projek yang dikenali sebagai Pelaksanaan Kawasan Utama. Perayu-perayu menentang kerja-kerja penambahbaikan tersebut dan mempertikaikan bahawa notis di bawah s 13 Akta Bekalan Elektrik 1990 ('Akta') tidak boleh digunakan untuk kerja-kerja yang akan dilakukan tersebut. Responden bertujuan untuk membina sebuah saluran bekalan utama dalam tanah perayu-perayu, jalan kecil berukuran lima kaki diperuntukkan bagi pemeriksaan saluran bekalan, penggunaan jalan-jalan yang telah wujud dan lorong untuk menjalankan kerja-kerja penambahbaikan dan kerja-kerja berkaitan apabila diperlukan. Perayu-perayu memohon untuk semakan kehakiman berkaitan dengan keputusan responden, yang berbentuk notis yang dikeluarkan oleh responden di bawah s 13 Akta. Perayu-perayu mengatakan bahawa notis tersebut tidak hanya membenarkan responden untuk menjalankan dan menyempurnakan kerja-kerja penambahbaikan yang dicadangkan malah responden sepatutnya mempertimbangkan peraturan kekadaran dan kesan kerja-kerja penambahbaikan terhadap perayu-perayu. Perayu-perayu juga mempertikaikan bahawa responden telah gagal mempertimbangkan jalan alternatif. Hakim Mahkamah Tinggi yang bijaksana dalam menolak permohonan perayu-perayu memutuskan, (i) bahawa jalan masuk ke tanah perayu-perayu untuk menjalankan kerja-kerja pemasangan bergantung kepada kewujudan tiang-tiang yang telah didirikan secara sah sebelumnya; (ii) bahawa kepentingan awam menghalang gangguan elektrik seluruh negara melebihi kepentingan peribadi perayu-perayu; dan (iii) bahawa alasan baru yang dikemukakan tidak diplidkan oleh perayu-perayu dalam pernyataan mereka. Selanjutnya, hakim Mahkamah Tinggi berpendapat bahawa kerja-kerja yang ingin dijalankan oleh responden adalah bertujuan untuk menyelenggara, membaiki atau menambahbaik sebarang pemasangan atas tanah tersebut, oleh itu notis tersebut terangkum dalam prosedur dan tujuan s 13 Akta. Sebelum rayuan responden telah bersetuju bahawa perayu-perayu boleh menggunakan keterangan baru untuk rayuan dan memfailkan rekod rayuan tambahan.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) Kerajaan mengutamakan kepentingan perayu-perayu dan 23 orang

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penduduk Kampung Sungai Terentang yang lain (penduduk yang terjejas) mencadangkan bahawa sama ada untuk mengambil pemerolehan tanah tersebut atau mempertimbangkan jalan-jalan alternatif. Walau bagaimanapun, responden secara tidak rasional dan munasabah meneruskan untuk menguatkuasakan notis yang dikeluarkan di bawah s 13 Akta. Keterangan fakta secara jelasnya menunjukkan ketidakrasionalan dalam tidak memperoleh tanah tersebut (lihat perenggan 12).

(2) Keterangan yang dikemukakan juga mengesahkan kesan perubatan negatif terhadap manusia, terutamanya kanak-kanak yang lebih cenderung kepada leukimia dan penyakit seumpamanya, apabila dihujani dengan saluran elektrik yang melalui rumah-rumah penduduk yang terjejas. Walaupun terdapat faktor-faktor yang mengancam nyawa, responden mendakwa bahawa wang pampasan secukupnya akan diberikan kepada penduduk yang terjejas atas ketidakselesaan mereka. Cara yang licik dan tidak berhati perut tersebut, mencegah dan menghalang, penduduk yang terjejas akan harta mereka, adalah merupakan pemerolehan tanah mereka oleh responden (kuasa yang boleh dijalankan hanya oleh pihak berkuasa negeri) yang boleh bercanggah dengan hak-hak perlembagaan mereka (perkara 13 Perlembagaan Persekutuan) (lihat perenggan 12).

(3) Dengan projek mega yang akan dijalankan, penduduk yang terjejas akan mengalami gangguan pemancaran, begitu juga dengan struktur-struktur yang menyokongnya dan menjejaskan kawasan terbabit secara langsung. Kerja-kerja penambahbaikan responden tidak boleh dikatakan sebagai usaha membaiki dan menyelenggara bahagian yang sedia ada dalam erti kebiasaan apabila superstruktur baru akan secara radikal dan dasar mengubah landskap dan menjadi ciri-ciri kekal (lihat perenggan 13).

(4) Responden menghujah bahawa kepentingan awam perlu diutamakan daripada ketidakpuasan hati perayu-perayu dan penduduk yang terjejas akan menginjak-injak hak-hak minoriti, walaupun dalam keadaan tertentu boleh diterima, kedengaran kosong apabila terdapat cara-cara alternatif untuk menyelesaikan masalah tersebut (lihat perenggan 14).

(5) Walaupun pliding perayu-perayu tidak menyatakan apa-apa mengenai notis menurut s 13 Akta yang mengalami kesalahan dari segi undang-undang, sudah menjadi hukum perundangan bahawa mahkamah lebih mementingkan keadilan sesuatu perkara daripada format atau prosedur. Responden tidak pernah diserang hendap atau dihalang daripada membalas isu-isu yang tidak diplidkan. Oleh itu, penghujahan responden bahawa ia tidak tahu dan tidak bersedia tidak bermerit (lihat perenggan 15).]

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Notes

For cases on powers of statutory body, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1765–1758.

Cases referred to

ACT Construction Ltd v Customs and Excise Commissioners [1981] 1 WLR 1542, HL (refd)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374, HL (refd)

Oversea-Chinese Banking Corporation Ltd v Philip Wee Kee Puan [1984] 2 MLJ 1, PC (refd)

Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185; [1994] 3 CLJ 567, SC (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317, CA (refd)

Legislation referred to

Court of Judicature Act 1964 s 25(2), Schedule para 1
Electricity Supply Act 1990 s 13
Federal Constitution art 13
Rules of the High Court 1980 O 53

Malik Imtiaz Sarwar (William Leong, Neoh Hor Kee and Yap Soon Lee with him) (HC Tan & Zahani) for the appellant.
Cyrus Das (Thiru and Shamsul Bahrin with him) (Shook Lin & Bok) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] Before we heard the appeal proper, by consent of the respondent the appellants were granted leave to use fresh evidence for the appeal. By consent too a supplementary record of appeal was allowed to be filed. At the end of the hearing we unanimously allowed the appeal with costs.

[2] We now reproduce the antecedents and facts of this case. The appellants' application falls under O 53 of the RHC 1980 primarily for a judicial review of the respondent's decision dated 21 June 2007, which decision comes in the form of a notice (the singular is to denote plurality too) issued by the respondent under s 13 of the Electricity Supply Act 1990 ('the Act'). The notice sought to permit the respondent to enter the premises ('the said land') owned by the appellants, in order to carry out upgrading works of the distribution supply lines, and other works incidental thereto.

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[3] The relief sought by the appellants was for an order of certiorari to quash the decision of the respondent in issuing the notice and a declaration that its issuance was null and void. Factually, the appellants and other residents of Kampung Sungai Terentang had occupied the land as licensees up until 1980s. Around late 1980s most of the residents were issued with titles to the land. Sometime in year 2005, the respondent began its upgrading exercise as part of its long term plan to enhance the electricity supply system under a project known as Central Area Reinforcement ('CAR'). The project covered a total area of 60km, divided into five sectors, with the disputed stretch involving the said land forming 1.5km of the total 15km of the third sector. In a nutshell the land under consideration by us is small. The appellants had objected to the alleged upgrading after they had knowledge of that project in 2005. Thenceforth, up to 2007, numerous meetings were held between the relevant parties but despite these initiatives the appellants still received the impugned notice dated 21 June 2007.

[4] The appellants, who represented themselves and 23 other owners or occupiers, had relied on the ground that the decision was illegal, with the s 13 of the Act notice being inapplicable for the anticipated work. The respondent had stated that its intention was to upgrade the electrical facilities running across the appellants' land, but the latter had complained that the respondent had failed to take into consideration the proportionality and effect of its decision, wherein monetary compensation was inadequate. It was not denied that the respondent intended to construct within their lands a main supply line for the transmission of 275 kV high voltage electricity structures, to construct a five foot pathway reserve for inspection of the supply line, to use the existing access roads and lanes for the construction and completion of the works and thereafter to carry out maintenance, repairs and upgrading of the installations from time to time.

[5] The filing of the action by the appellants, in brief was founded on the ground that the decision pursuant to the s 13 notice was illegal, being ultra-vires both on procedural and substantive ground. The notice, it was alleged, which did not merely permit the respondent to carry out and complete the type and proposed work, was irrational and violating the rule of proportionality, having failed to take into consideration relevant matters, and had also failed to take into consideration an alternative route. Leave was granted by the High Court on 28 September 2007, for the appellants to proceed with the application (encl 1) but was dismissed on 7 December 2007. Being dissatisfied a notice of appeal was filed on that same date.

[6] The learned judge when dismissing the application had found that the grounds of the application were too general and lacked the necessary precision. In the course of the hearing new grounds were raised by the

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appellant, matters which were not pleaded in their statement. The learned judge concluded that this was fatal as parties were bound by the four corners of their pleadings. Despite arriving at that conclusion the judge however proceeded to discuss the new grounds in the event she was found wrong in her conclusion.

[7] The court, inter alia, when supplying its reasons viewed that the s 13 notice was meant for 'maintenance, repair and upgrading of installation', and entry on the said land depended on the existence of posts, which had been erected lawfully. On this issue she found that the appellants did not dispute the fact that the posts had been erected as early as 1974–75, and LLN was allowed by the state government to enter into the said land for the purpose of carrying out the installation works. From the conclusion of the learned judge, it was obvious that she found the intended construction or works carried out on the land, were for the purpose of maintaining, repairing or upgrading any installation on it. The learned judge further opined that the construction of transmission lines from 33kV–275kV, together with the other peripheral actions, fell under the definition of upgrading rather than a major reconstruction. The issuance of the notice thus fell correctly within the procedure and purpose envisaged in the relevant provision.

[8] At the conclusion of the hearing the learned judge summarised the matter by enunciating that the whole substratum of the case was founded on public interest. She found that the main objective of the CAR project was to prevent disruption of electricity supply which had happened nationwide on 13 January 2005. For this purpose, the public interest certainly would outweigh the private interests of the appellants. Based on the aforesaid reasons, the learned judge concluded that the appellants had not made out a case for judicial review on the grounds sought, and accordingly dismissed the application with costs.

[9] On the aspect of the principles governing judicial view, we found no reason to disagree with the learned judge's comments that the High Court merely exercises supervisory jurisdiction in judicial review proceedings over the decisions of public authorities and administrative bodies (s 25(2) of the Court of Judicature Act 1964 read together with para 1 of the Schedule). In this case the respondent is treated as a public authority for review purposes. The learned judge correctly stated that in any judicial review proceedings the role of the High Court is to detect whether the decision making process by the public authorities or administrative body is infected by errors of law or not. The errors of law would include illegality, irrationality and procedural impropriety (*Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374).

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[10] After scrutinizing the application and the supporting statement, documentary evidence, and the submission be it written or oral we concluded that the matter before us was not too complicated. In a gist we had to decide whether with the facts before us, the s 13 notice in the circumstances of the case was correct or not. Having perused the evidence adduced at the High Court and the recently adduced fresh evidence, we could not help but conclude that the notice was flawed for irrationality and or being procedurally improper, and inevitably falling under the principle of 'errors of law'.

[11] The antecedents of this case showed that on 23 May 2007 Dato' Seri Dr Lim Keng Yaik the Minister of Energy, Communications and Multimedia directed the respondent to consider the feasibility of using an alternative route. On 27 December 2007 the State Government of Selangor declared vide *Gazette* No 3528 its intention to acquire some of the said land. This *Gazette* was issued at the time when the Barisan Nasional Government was ruling the State of Selangor. Come March 2008 the Pakatan Rakyat Government took over the governance of the state. This new government also saw it fit to appoint external consultants to study the viability of an alternative route and the impact of the pylons pursuant to the construction of their superstructure, on the residents of Kampung Sungai Terentang. On 3 December 2008 the State Government of Selangor abandoned the idea of acquiring the impugned land, and stated that after due discussion with the relevant consultants, and after taking into consideration the interests of all the affected parties, the respondent ought to take an alternative route.

[12] Gauging from the above paragraph it was quite clear that either the previous government or the incumbent one, in the interest of the appellants and 23 others, had suggested either the acquisition of the said lands or to consider alternative routes. Despite all the studies and sanity prevailing, the respondent irrationally and unreasonably persisted to enforce the s 13 notice. Apart from the reasons held by the current state government why an alternative route ought to be considered, the factual evidence conspicuously also revealed the irrationality of not acquiring the lands involved. Let us analyse the neutral evidence adduced which comes in the form of the tendered pictures (RR 550–554). These pictures highlight the difference in sizes between an LLN 33kV post (an original post) and the gigantic new TNB 275kV transmission tower. It would be impossible to put on paper the indescribable and perpetual fear the appellants would have to undergo, either imagined or real, if they have to live under the giant pylons that overhang their houses day in and day out after the construction is completed. Needless to say prior to the completion of these structures the appellants would already have a taste of the future bitter sufferings when they have to put up with the huge machineries and other infractions by the workers of the respondent.

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From pp 555–562 are seen the effect of fallen pylons and the hazard that go with it. Evidence adduced also confirmed the negative medical effect on people, especially children who are more susceptible to leukaemia and like diseases, when bombarded by the flow of electricity passing over their houses. Yet despite these hazardous life threatening factors the respondent ventilated that money would be adequate to compensate them for their discomfort. The compensation received by the appellants is supposed to mollify the appellants for living under the pylons with all the hidden dangers which have not been explained to them. The respondent would eventually reap the benefits of their displacement without much effort and expense when the appellants eventually abandon their homes for fear of their health and lives. This subtle and unconscionable way of driving and depriving the appellants of their property, hence in effect an acquisition of their land by the respondent (a power exercisable only by the state authority), surely would contravene their constitutional rights (art 13 of the Federal Constitution).

[13] With such a mega project in the offing, and the eventual repercussion pervading the lives of the appellants being so major, this panel was unable to agree with the stance of the respondent or the finding of the learned judge. This was not just tightening of the loose screws, repainting the posts, replacing the aging posts with new but similar types of structure, which could be accepted as upgrading, but an exercise that would witness a major emplacement of the transmission lines together with the structures holding them, and affecting the area involved in no uncertain terms. How could it be construed that the exercise of the respondent was to repair and maintain the existing posts in the ordinary sense, when the new superstructures, which would radically and fundamentally alter the landscape are now the permanent features (*ACT Construction Ltd v Customs and Excise Commissioners* [1981] 1 WLR 1542). The previous posts would see no repairs being undertaken but totally dismantled and replaced, and a large area of the appellants' land by necessity, encroached when the mega project has been completed. A major upheaval in the health and lives of the appellants would undoubtedly be witnessed thereafter.

[14] The respondent canvassed the argument before us that public interest must override the grievances of the appellants. This argument, which would smack of riding rough shod over a minority's rights, though in certain circumstances may be acceptable, sounds hollow when there are other alternative ways to solve the problem. There is even evidence before us to show that, apart from the views held by the incumbent state government, even the respondent at one point of time did agree to consider this alternative suggestion. Unfortunately for reasons not divulged satisfactorily the respondent reneged on its promise. That being so, regretfully, in the circumstances of the case this point also holds no water.

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[15] One final matter that requires attention is the complaint by the respondent that the pleadings did not state anything about the notice suffering errors of law. Even if the respondent were quite right, it is trite that courts are more concerned with the justice of a matter rather than being overly concerned with format or procedure, and that being so we allowed the appellant to submit on this issue. Having scrutinised the notes of proceedings and the submissions, touched upon also by the learned judge in the grounds of judgement, we were satisfied that at no time was the respondent caught flat footed, or prevented from replying to this so-called unpleaded issue. At every step of the way, from the early stages of the application for leave, the stage of the interparty application before the learned judge, and eventually the rehearing before us, the respondent was sufficiently put on notice of this argument. Any submission of being caught unaware and unprepared thus was without merit (*Oversea-Chinese Banking Corporation Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1; *Superintendant of Lands and Surveys, 4th Division & Anor v Hamit b Matusin & Ors* [1994] 3 CLJ 567; [1994] 3 MLJ 185).

[16] With the pleading matter resolved, and what that notice entailed, together with the disproportionate sufferings to be experienced by the appellants at the hands of the respondent, by no account could it be said that it had been issued without any error of law. Based on the above reasons we therefore allowed the appeal with costs here and below and set aside the order of the learned judge. We thereupon granted order in terms of the appellants' application to encl 1.

Appeal allowed with costs here and court below.

Reported by Mashrifah Ravendran